

JASON R. MORTON
Claimant

HANCO, INC.-HANDY
Respondent

TWIN CITY FIRE INS. CO.
Insurance Carrier

ORDER

Respondent and its insurance carrier (respondent) requested review of the March 31, 2009, preliminary hearing Order and the April 8, 2009, Order, both entered by Administrative Law Judge John D. Clark. Respondent's Application for Review was filed on April 17, 2009. William A. Wells, of Wichita, Kansas, appeared for claimant. J. Sean Dumm, of Overland Park, Kansas, appeared for respondent.

In an Order dated March 31, 2009, the Administrative Law Judge (ALJ) found that claimant's current condition was a direct and natural result of his work-related accident of August 10, 2006, and ordered respondent to pay for claimant's medical treatment. The ALJ also authorized Dr. Daniel Boedeker as claimant's treating physician. After the issuance of that order, however, the ALJ was informed that Dr. Boedeker did not accept patients involved in Kansas workers compensation cases. After a telephone conference, the ALJ entered an Order on April 8, 2009, authorizing Dr. Eric Sherburn to be claimant's treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 31, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that the evidence does not show that claimant's current problems are the result of an accidental injury that arose out of and in the course of his employment on August 10, 2006. Respondent further contends that claimant failed to timely serve respondent with a written claim for benefits. Respondent also asserts that the ALJ's order of April 8, 2009, is procedurally improper. It argues that the ALJ erred in directing a change of physician without requiring claimant to file a demand for compensation and in failing to permit respondent to provide a list of three physicians from which an authorized treating physician could be chosen.

Claimant contends that respondent failed to argue the issue of timely written claim at the preliminary hearing and, therefore, the defense is waived and cannot be argued for the first time on appeal. Claimant also requests that the Board affirm the ALJ's finding that claimant's current condition was related to his work-related accident of August 10, 2006. Last, claimant argues that the ALJ did not err in authorizing Dr. Sherburn to be claimant's treating physician as respondent had failed to provide claimant with medical treatment.

The issues for the Board's review are:

- (1) Is this appeal of the ALJ's March 31, 2009, preliminary hearing Order timely?
- (2) If so, is claimant's current condition a direct and natural result of his work-related accident of August 10, 2006?
- (3) Does the Board have jurisdiction over the issue of timely written claim? If so, did claimant give respondent timely written claim for workers compensation benefits?
- (4) Did the ALJ exceed his jurisdiction in his April 8, 2009, Order by authorizing Dr. Sherburn to be claimant's treating physician?

FINDINGS OF FACT

The ALJ's preliminary hearing Order of March 31, 2009, states:

It is the opinion of Dr. James Mizell that an MRI performed on January 13, 2009 shows: "findings are thought to be most likely secondary to old compression fractures of L3 and L4 with formation of schmorl nodes."

This court finds that the claimant's present problems are [a] direct and natural result of his job related automobile accident of August 10, 2006.

Dr. Daniel J. Boedeker is authorized as the claimant's treating physician. All medical is ordered paid.¹

On April 8, 2009, the ALJ entered another Order, which states:

A hearing was held on March 31, 2009 wherein Daniel J. Boedeker was authorized as the claimant's treating physician. The Court has been informed that Dr. Boedeker does not accept Kansas workers compensation cases.

Dr. Eric Sherburn is authorized as the claimant's treating physician. All medical is ordered paid.²

Respondent filed an Application for Review of both the March 31, 2009, and the April 8, 2009, Orders, which was received by the Division of Workers Compensation on April 17, 2009.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-551(i) states in part:

(1) Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, modifications of awards, **or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation.** Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556 and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

(2) (A) **If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.** Such an appeal from a preliminary award may be heard and decided by a single member

¹ ALJ Order (Mar. 31, 2009).

² ALJ Order (Apr. 8, 2009).

of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties. (Emphasis added.)

K.S.A. 44-525(a) states:

Every finding or award of compensation shall be in writing signed and acknowledged by the administrative law judge and shall specify the amount due and unpaid by the employer to the employee up to the date of the award, if any, and the amount of the payments thereafter to be paid by the employer to the employee, if any, and the length of time such payment shall continue. **The award of the administrative law judge shall be effective the day following the date noted in the award.** (Emphasis added.)

K.S.A. 44-534a(a)(2) states:

Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. **Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim,** except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. **A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.** Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. **Except as provided in this section, no such**

preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts. (Emphasis added.)

K.A.R. 51-18-2 states:

(a) The effective date of the administrative law judge's acts, findings, awards, decisions, rulings, or modifications, for review purposes, shall be the day following the date noted thereon by the administrative law judge.

(b) Application for review by the workers compensation board shall be considered as timely filed only if received in the central office or one of the district offices of the division of workers compensation on or before the tenth day after the effective date of the act of an administrative law judge.

(c) An application for review may be filed by facsimile directly to the division of workers compensation.

ANALYSIS

The ALJ's preliminary hearing Order of March 31, 2009, was effective on April 1, 2009. Excluding intervening weekends, respondent's appeal was due by April 15, 2009. It was not filed until April 17, 2009. Therefore, it is out of time.

Respondent's appeal of the ALJ's April 8, 2009, preliminary hearing Order was timely filed. But that order dealt solely with the question of which physician was authorized to provide the treatment the ALJ had ordered in his March 31, 2009, Order. The ALJ did not exceed his jurisdiction in making this order. Furthermore, the April 8, 2009, Order did not decide any issues of compensability. Those issues had already been decided in the earlier Order.

On an appeal from a preliminary hearing order, the Board is without jurisdiction to review findings as to which physician is authorized to provide claimant medical treatment. Whether the ALJ erred by not allowing respondent to provide claimant with a list of three physicians is not a jurisdictional issue.

CONCLUSION

(1) The appeal of the preliminary hearing Order entered March 31, 2009, is out of time and is dismissed.

(2)(3) The Board does not reach the issues and defenses raised at the March 31, 2009, preliminary hearing.

(4) The ALJ did not exceed his jurisdiction in authorizing Dr. Sherburn to be claimant's treating physician.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that this appeal from Administrative Law Judge John D. Clark's Order of dated March 31, 2009, and Order of April 8, 2009, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of June, 2009.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: William A. Wells, Attorney for Claimant
J. Sean Dumm, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge